No. 78-658

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UTAH POWER & LIGHT COMPANY, *Petitioner*

v.

ENVIRONMENTAL DEFENSE FUND, INC.,
DOUGLAS M. COSTLE, *Et Al*, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

REPLY BRIEF FOR PETITIONER

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INDEX TO CITATIONS

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REPLY BRIEF FOR PETITIONER

Both the federal respondents and respondent Environmental Defense Fund (EDF) attempt to characterize the Court of Appeals' decision in this case as a routine application of an established legal principle. Fed. Def. Br. at 4-6; EDF Br. at 15-17. Both parties also deny the existence of any conflicts between the interests of Utah Power and the interest of the states which are allegedly representing Utah Power in this litigation. Fed. Def. Br. at 6-8; EDF Br at 20-21. These characterizations and denials, however, do not

accurately assess either the law or the facts relevant to this case. The issue raised by Utah Power in its petition thus remains deserving of review by this Court.

I.

Respondents claim that the standard which this Court formulated in *New Jersey* v. *New York,* 345 U.S. 369 (1953), an original jurisdiction action, governs all adequacy of representation questions when the federal government or a state is a party to litigation. Fed. Def. Br. at 5-6; EDF Br. at 15-17. Under this standard, "an intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state", 345 U.S. at 373. The federal respondents contend that this principle is "well settled", even in non-original jurisdiction actions, Fed. Def. Br. at 5, and EDF describes it as a "working rule . . . familiar . . . in a variety of descriptive terms and contexts." EDF Br. at 16. However, application of the *New Jersey* standard in non-original jurisdiction actions is far from universal, and it is this Court's interpretation of Rule 24(a) of the Federal Rules of Civil Procedure in *Trbovich* v. *United Mine Workers,* 404 U.S. 528 (1972) which is the "well-settled" interpretation which has been adopted by the Court of Appeals for the District of Columbia Circuit.

This Court held in *Trbovich* that an individual union member was not adequately represented by the Secretary of Labor even though the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 481, *et seq.* made the Secretary, in effect, "the union member's lawyer." 404 U.S. at 539. The *Trbovich* Court's failure to even mention the *New Jersey* rule certainly

casts doubt on the federal respondents' contention that the *New Jersey* rule is applicable even where the federal government is a party to the litigation, Fed. Def. Br. at 5.

In *United States* v. *Nevada and California,* 412 U.S. 534 (1973) this Court discussed the scope of the *New Jersey* standard and clearly limited it to suits invoking the Court's original jurisdiction. 412 U.S. at 538.[1] Despite its clear relevance to the issue presented here, the federal respondents completely ignore *United United* v. *Nevada.*[2]

When presented with claims that a governmental entity adequately represents a prospective intervenor's interest, the lower federal courts frequently apply the *Trbovich* rather than the *New Jersey* standard. In *National Farm Lines, Inc.* v. *Interstate Commerce Commission,* 564 F.2d 381 (10th Cir. 1977), National Farm Lines sought a declaration that § 203(b)(5) of the Interstate Commerce Act, 12 U.S.C. § 114j, and certain regulations promulgated thereunder were un-

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[1] The Court unambiguously stated that "the individual users of water . . . ordinarily would have no right to intervene in an original action in this Court", citing *New Jersey* as sole authority for that proposition. The Court then immediately added that these same water users "would have an opportunity to participate in their own behalf if this litigation goes forward in the District Court". 412 U.S. at 538.

[2] Respondent EDF attempts to draw a distinction between the Court's use of the phrases "opportunity to participate" and "right to intervene", arguing that the former does not necessarily include the latter. EDF Br. at 17-18. Even assuming the validity of that distinction, it is nonetheless clear that the Court expressly applied the *New Jersey* standard in determining the appropriateness of intervention in the original jurisdiction action but made no suggestion that it would apply in the District Court proceedings.

constitutional. The statutory and regulatory scheme was designed to protect the regulated motor common carrier industry from unregulated competition. In reversing the district court's denial of intervention to several regulated common carriers, the Court of Appeals for the 10th Circuit ruled that even though the issue was purely one of the legality of statutes and regulations, the I.C.C. would be unable to represent the economic interests of the regulated motor carriers. The Court of Appeals never mentioned the *New Jersey* standard despite the Interstate Commerce Commission's presence in the litigation. The court's opinion reflects instead this Court's reasoning in *Trbovich.*

> We have here also the familiar situation in which the governmental agency is seeking to protect not only the interest of the public but also the private interest of the petitioners in intervention, a task which is on its face impossible. The cases correctly hold that this kind of a conflict satisfies the minimal burden of showing inadequacy of representation.

564 F.2d at 384.

Other cases have also recognized the inadequacy of governmental representation of the interests of private parties without even mentioning *New Jersey.* In *Natural Resources Defense Council, Inc.* v. *Costle,* 561 F.2d 904 (D.C. Cir. 1977), various environmental groups brought an action against the Administrator of the Environmental Protection Agency seeking declaratory and injunctive relief against EPA with respect to its duties under Section 307(a) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1317(a). The Court of Appeals for the District of Columbia Circuit ruled that the district court

had erred in denying intervention to various rubber and chemical companies who were directly affected by the regulations. The Court of Appeals held that intervention was warranted under *Trbovich* despite the district court's insistence that EPA could adequately represent the private parties' interests. The court ignored *New Jersey* and applied *Trbovich* in spite of the federal government's participation in the suit. *See also Atlantic Refining Company* v. *Standard Oil Co.,* 304 F.2d 387 (D.C. Cir. 1962).[3]

Other instances of courts holding that the government may not adequately represent private interests in cases challenging the validity of statutes, regulations, or ordinances include: *Planned Parenthood of Minnesota, Inc.* v. *Citizens For Community Action,* 558 F.2d 861 (8th Cir. 1977); *Joseph Sillken and Co.* v. *City of Toledo,* 528 F.2d 867 (6th Cir. 1975), *vacated on other grounds,* 429 U.S. 1068 (1977); *General Motors Corp.* v. *Burns,* 50 F.R.D. 401 (D. Hawaii, 1970); *Holmes* v. *Government of Virgin Islands,* 61 F.R.D. 3 (D. St. Croix 1973); *Nader* v. *Ray,* 363 F. Supp. 946 (D.D.C. 1973). In each case the person or

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[3] In *NRDC* v. *Berklund,* No. 75-0313 (June 30, 1978 D.D.C.) *appeals docketed* Nos. 78-1757, 78-1787, 78-1842 (D.C. Cir. 1978). Utah Power, a public utility was permitted to intervene in an action brought by private environmental organizations contesting the validity of the Interior Department's interpretation of § 201(b) of The Mineral Leasing Act of 1920, 30 U.S.C. §§ 181 *et seq.* in spite of the fact that it was only one of 182 lease applicants. Even though the issue was purely a question of statutory construction and the litigation would affect Utah Power's lease applications only in subsequent administrative proceedings, a situation much like the instant case, the District Court permitted intervention without applying the *New Jersey* rule. *See also NRDC* v. *Hughes,* 437 F. Supp. 981, (D.D.C. 1977) *appeal docketed* No. 78-1656 (D.C. Cir. 1978).

group was allowed to intervene without satisfying the *New Jersey* standard.

It is thus obvious that the federal respondents' "well settled" *New Jersey* standard is anything but "well settled" in non-original jurisdiction actions.[4]

II.

Both the federal respondents and EDF attack Utah Power's claim that its interests are not adequately represented by existing parties in this litigation.[5] Both

[4] The cases relied on by the federal respondents fall far short of sustaining their contention that the *New Jersey* standard is "well settled". *United States* v. *Associated Milk Producers, Inc.*, 534 F.2d 113 (8th Cir.), *cert. den.* 429 U.S. 940 (1976), *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961) and *Illinois* v. *Bristol-Myers Co.*, 470 F.2d 1276 (D.C. Cir. 1972) all were instances where the federal government or state government brought an anti-trust action. Since the prospective intervenors could always bring their own treble damage suits to vindicate their private interests, 366 U.S. at 690, the courts' failure to allow them to intervene in an enforcement action designed to protect the public interest was not surprising.

Both *Commonwealth of Pennsylvania* v. *Rizzo*, 530 F.2d 501 (3d Cir.), *cert. den.*, 426 U.S. 921 (1976), and *Leech Lake Area Citizens Committee* v. *Leech Lake Band of Chippewa Indians*, 486 F.2d 888 (8th Cir. 1973) were intervention cases concerned more with timeliness issues than with questions of adequacy of representation. In *Leech Lake*, the prospective intervenors moved to intervene only after the case had gone to trial, a judgment rendered, appeals taken, and the case remanded to the district court. In *Rizzo*, the prospective intervenor moved to intervene over eleven months after the case commenced and several days after the court had issued an injunction *pendente lite*.

[5] The federal respondents' misperception of Utah Power's position is evident in their statement that "[p]etitioners also contend that they have demonstrated such compelling interests in their own right . . ." Fed. Def. Br. at 6. Utah Power has never attempted

parties base their arguments on Utah Power's shared interest with the federal defendants and the states in defending the validity of the current regulations. This similarity in interest, they argue, enables the existing parties to this litigation to adequately represent Utah Power's interest, despite the state's express disclaimer of such an ability.[6] Fed. Def. Br. at 7 n.4; EDF Br. at 21-22. However, this case does not involve only the issue of the validity of the states' standards. The federal respondents have recognized that EDF has asked for relief other than a declaration of the invalidity of the standards. *See* Fed. Def. Br. at 7, n.5. Thus, the opposing parties' "unity of interest" argument is inappropriate. But even if the validity of the standards was the sole issue in this case, Utah Power would be inadequately represented by these parties.

The fact that a prospective intervenor urges a resolution of the litigation which is identical to that ad-

to show that its interest, which satisfies Rule 24(a), meets *New Jersey's* stricter standard for judging adequacy of representation. Utah Power demonstrated its interest in this litigation and neither the district court nor the Court of Appeals found that interest inadequate to satisfy the interest requirements of Rule 24(a). The Court of Appeals erroneously forced Utah Power to satisfy *New Jersey's* "compelling interest" standard in order to demonstrate inadequacy of representation when all that Utah Power was required to show under *Trbovich* was that representation of its interests by existing parties "may be" inadequate—a "minimal burden". Utah Power amply met that test. Utah Pet. at 16-18.

[6] Contrary to the respondents' contentions, Fed. Def. Br. at 7, n.4, EDF Br. at 22, courts have often given significant weight to statements by existing parties that they would be unable to adequately represent a prospective intervenor's interest. *See, New York P.I.R.G.* v. *Regents of the University of the State of New York*, 516 F.2d 350, 352 (2d Cir. 1975); *General Motors Corp.* v. *Burns*, 50 F.R.D. 401 (D. Hawaii, 1970).

vanced by existing parties is insufficient by itself to establish adequacy of representation when the prospective intervenor possesses substantial economic interests in the litigation. *See Trbovich, supra; National Farm Lines* v. *I.C.C., supra; New York P.I.R.G.* v. *Regents of University of State of New York,* 516 F.2d 350 (2d Cir. 1975); *Holmes* v. *Government of Virgin Islands, supra; Natural Resources Defense Council, Inc.* v. *United States Nuclear Regulatory Commission,* 578 F.2d 1341 (10th Cir. 1978). In this case, Utah Power possesses a substantial economic interest in the litigation. The district court found that Utah Power "has an interest in this matter", App. A, Utah Pet. p. 11a, and "[t]here is a possibility that if this court invalidates these regulations the ensuing rulemaking may result in a curtailment of Utah Power's water use and storage rights." App. A, Utah Pet. p. 12a. Since these water use and storage rights are the cornerstone of the company's economic survival, Utah Power can be expected to make a more vigorous presentation of the economic side of the argument than would the existing defendants.[7] *See N.Y.P.I.R.G., supra* at 352.

Although Utah Power and the current defendants have a similar interest in sustaining the states' plans and regulations, these interests are not identical. The states, as the sovereign entities drafting these standards, and the federal defendants, as the officials approving these standards, possess interests which do not include the proprietary-economic interests of Utah

[7] It is this substantial economic interest in maintaining its water use and storage rights which sets Utah Power apart from the "millions of citizens" who are interested in controlling salinity pollution in the Basin and with whom EDF would lump Utah Power. EDF Br. at 8.

Power. The states and the federal government have an obvious sovereign interest in seeing their regulations and actions judicially affirmed.

> But it is not impossible to imagine that, as the litigation develops, the Government might conclude that a new statute passed under unquestionable circumstances might better serve their interest. Or they might conclude that change in the original plans was warranted and, therefore, the statute need not be vigorously defended.

Holmes v. *Gov't of Virgin Islands, supra* at 5. *See also NRDC* v. *Costle, supra.* Utah Power, on the other hand, has a large, immediate financial interest to protect. It cannot afford to have the carefully structured current system of salinity standards and implementation plans disturbed by a government determination that the regulations should be changed.

Thus, although Utah Power's interest in this litigation may not be one which is so distinct from that of the current defendants so as to qualify as a "compelling interest in its own right" under *New Jersey,* it is nonetheless clear that representation of that interest by existing parties "may be" inadequate under *Trbovich.*

III.

This Court should be aware of a recent decision which bears directly on the issue presented for review. In *Environmental Defense Fund, Inc.* v. *Higginson,* No. 78-1135 (D.D.C., filed June 21, 1978), EDF, along with several other groups, instituted an action requesting an order requiring the federal defendants to prepare a comprehensive environmental impact statement

analyzing existing and future water resource projects and operations in the Colorado River Basin.

Higginson was filed shortly before the Court of Appeals denied the intervention motions at issue here. Several Basin states—Arizona, Colorado, Nevada and Wyoming—moved to intervene. The state of Utah did not seek intervention. Utah Power also moved to intervene. The basis for Utah Power's intervention motion was again its rights to withdraw, use and store Colorado River water. Its interest was thus similar to its interest in the current litigation.

On November 3, 1978, the district court granted Utah Power's and all of the states' intervention motions.[8] The only reason given by the district court for allowing Utah Power to intervene was the fact that "the *parens patriae* doctrine does not apply to the Utah Power and Light Company . . . because it is not a citizen of any state that has moved to intervene in this suit. The company, therefore, is entitled to intervene as of right." App. A., p. 3a. It is evident from the district court's action that it found that Utah Power satisfied both the interest and the impairment requirements of Rule 24(a) in factual circumstances basically the same as were involved in this case. However, the Court found that the company also satisfied the inadequacy of representation test because the State of Utah had not moved to intervene. Thus, it appears that the district court and the Court of Appeals have formulated an intervention rule which depends on *when* the applicant for intervention files his motion. Assuming the applicant has an interest which could be impaired, he

[8] The Court's order is attached hereto as Appendix A.

will be allowed to participate if this motion is filed and granted before his parent state moves to intervene. However, if the state's motion precedes the applicant's, the state will be presumed to be representing the applicant's interests and intervention will be denied.

The Court of Appeals' contortion of this Court's *New Jersey* decision and its circumvention of this Court's *Trbovich* standard are the forces which produce this unusual result. Review of the Court of Appeals' action is thus essential to clarify and reestablish the proper standards to be applied in the interpretation of an important Federal Rule of Civil Procedure.

IV. CONCLUSION

For the foregoing reasons, as well as for the reasons stated in Utah Power's Petition, a writ of certiorari should be issued.

Respectively submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1135

Filed November 3, 1978
James F. Davey, Clerk

ENVIRONMENTAL DEFENSE FUND INC., ET AL., *Plaintiffs*,

v.

R. KEITH HIGGINSON, Commissioner, Bureau of Reclamation, Department of Interior, ET AL. *Defendants*.

MEMORANDUM AND ORDER

This matter comes before the court on motions to intervene filed by four states and several local entities. In this suit, the plaintiffs seek declaratory, injunctive, and mandatory relief pursuant to Section 102(c) of the National Environmental Policy Act ("NEPA") of 1969, 42 U.S.C. §§ 4321 *et seq.* The plaintiffs ask this court to order the federal defendants to prepare a comprehensive environmental impact statement ("EIS") analyzing existing and future water resource projects and operation in the Colorado River Basin ("Basin"). As part of their prayer for relief, the plaintiffs seek to enjoin the construction of nine planned federal water resource projects in the Basin pending completion of the comprehensive EIS.

Each of the movants seeks intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure or, in the alternative, permissive intervention under Rule 24(b). The first group of intervenors comprises four of the seven Basin states affected by the federal program of water resource development projects: Arizona, Colorado, Nevada, and Wyoming. The second group comprises four local Colorado water districts, one local Nevada water district, and one electrical utility company. The plaintiffs

do not oppose intervention by the states, although they suggest that it would be appropriate for the court to impose conditions on the participation of those states admitted as parties to this litigation. Intervention by the second group of entities, whether of right or permissive, is opposed by the plaintiffs. The federal defendants apparently do not oppose the intervention of either group of movants.

The four states of Arizona, Colorado, Nevada and Wyoming are entitled as of right to intervene in this action. The plaintiffs raise the concern, however, that, as parties, those states might adopt dilatory measures that could impede the prompt resolution of this suit. But, at this point in the litigation the plaintiffs' fears of duplicative discovery and dilatory motion practice are too conjectural to warrant the imposition of conditions upon the intervenors. If future actions by the intervening parties threaten to jeopardize the efficient conduct of the proceedings, the court will consider imposing appropriate conditions upon those parties.

The court will deny the motions filed by the Nevada entity and the Colorado entities to intervene as of right in this suit. As in *EDF* v. *Costle,* Civil Action No. 77-1436 (Mem. Op. April 20, 1978), *sum. aff'd* Appeals Nos. 78-1471, 78-1515, and 78-1566 (D.C. Cir. 1978), the intervening states of Colorado and Nevada will be able to speak for and represent the interests of the local groups who seek to become parties to this litigation. The fact that the interests of these groups may diverge from those of the federal defendants does not make out a case of inadequate representation under Rule 24(a)(2), because the court has ruled that Colorado and Nevada are entitled to intervene. None of the local Colorado water districts or the local Nevada water district has offered any compelling reason or circumstance, *see State of New Jersey* v. *State of New York,* 345 U.S. 369 (1953), in which they differ materially with the positions taken by those intervenors. Therefore, under the doctrine of *parens patriae* the interests of these five entities are adequately represented in the present suit.

The *parents patriae* doctrine does not apply to the Utah Power and Light Company, a utility company which supplies a large portion of the total electricity needs of Utah and Wyoming, because it is not a citizen of any state that has moved to intervene in this suit. The company, therefore, is entitled to intervene as of right.

The court in its discretion will deny the motion for permissive intervention under Rule 24(b) filed by the local Nevada water district and the local Colorado water districts. A review of the arguments the local groups propose to advance if they are admitted to this action indicates that they either are cumulative or would be unlikely to help this court resolve the question of the government's compliance with NEPA.

Therefore, upon consideration of the motions to intervene and the opposition thereto, it is, by the court, this 3rd day of November, 1978,

ORDERED that the motions of Arizona, Colorado, Nevada, Wyoming, and the Utah Power and Light Company to intervene as of right are granted; and it is further

ORDERED that the motions of the Colorado River Water Conservation District, Southwestern Water Conservation District, Dolores Water Conservancy District, Tri-County Water Conservancy District, and Las Vegas Valley Water District to intervene as of right or, in the alternative, for permissive intervention are denied.

/s/ THOMAS A. FLANNERY
Thomas A. Flannery

United States District Judge